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No. 701

IN THE

Supreme Court of the United States

October Term, 1962

ERNEST KLEIN,

Petitioner,

vs.

WALSTON & CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

ERNEST KLEIN,
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WALSTON & CO., INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Supreme Court of the United States:

Ernest Klein of the City of New York prays that a writ of certiorari issue to review the order of the Court of Appeals entered on September 27, 1962.

Citation of Opinions Below

(See Appendix)

Jurisdiction

The final order of the Court of Appeals of the State of New York which is sought to be reviewed herein was made on September 27, 1962.

The jurisdiction of this Court is invoked under 28 U. S. Code, Sections 1257 and 2102(c) on the ground that the Court of Appeals of the State of New York erroneously concluded that it had no jurisdiction to entertain the appeal upon the ground that "the orders sought to be appealed from do not finally determine the actions within the meaning of the Constitution."

Questions Presented for Review

Whether or not the Court of Appeals of the State of New York correctly interpreted its powers under the Constitution of the State of New York and whether its erroneous interpretation of its powers constituted a violation of petitioner's rights under the Fourteenth Amendment to the Constitution of the United States.

Provisions of the Constitution of the United States in Point

"No State shall * * * deprive any person of life, liberty or property without due process of law * * *"

New York State Constitution Provision Involved

Article VI, sec. 7 of the Constitution of the State of New York defines the jurisdiction of the Court of Appeals (the highest Court of the State) as follows:

> "[Jurisdiction of court of appeals.] § 7. The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final or interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.
>
> Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section:
>
> In criminal cases, directly from a court of original jurisdiction where the judgment is of death, and in

other criminal cases from an appellate division or otherwise as the legislature may from time to time provide.

In civil cases and proceedings as follows:

(1) As of right, from a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding wherein is directly involved the construction of the constitution of the state or of the United States, or where one or more of the justices of the appellate division dissents from the decision of the court, or where the judgment or order is one of reversal or modification.

(2) As of right, from a judgment or order of a court of record of original jurisdiction which finally determines an action or special proceeding where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States; and on any such appeal only the constitutional question shall be considered and determined by the court.

(3) As of right, from an order of the appellate division granting a new trial in an action or a new hearing in a special proceeding where the appellant stipulates that, upon affirmance, judgment absolute or final order shall be rendered against him.

(4) From a determination of the appellate division of the supreme court in any department, other than a judgment or order which finally determines an action or special proceeding, where the appellate division allows the same and certifies that one or more questions of law have arisen which, in its opinion, ought to be reviewed by the court of appeals, but in such case

the appeal shall bring up for review only the question or questions so certified; and the court of appeals shall certify to the appellate division its determination upon such question or questions.

(5) From an order of the appellate division of the supreme court in any department, in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court of tribunal, other than an order which finally determines such proceeding, where the court of appeals shall allow the same upon the ground that, in its opinion, a question of law is involved which ought to be reviewed by it, and without regard to the availability of appeal by stipulation for final order absolute.

(6) From a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding but which is not appealable under subdivision (1) of this section where the appellate division or the court of appeals shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals. Such an appeal may be allowed upon application (a) to the appellate division, and in case of refusal, to the court of appeals, or (b) directly to the court of appeals. Such an appeal shall be allowed when required in the interest of substantial justice.

(7) No appeal shall be taken to the court of appeals from a judgment or order entered upon the decision of an appellate division of the supreme court in any civil case or proceeding originally commenced in any court other than the supreme court, a county court, a surrogate's court, or the court of claims unless the construction of the constitution of the state or of the United States is directly involved therein, or unless the appellate division of the supreme court

shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals.

(8) The legislature may abolish an appeal to the court of appeals as of right in any or all of the cases or classes of cases specified in subdivision (1) of this section wherein no question involving the construction of the constitution of the state or of the United States is directly involved, provided, however, that appeals in any such case or class of cases shall thereupon be governed by subdivision (6) of this section."

The Facts

In the Court below (the Supreme Court, New York County) the petitioner moved to vacate and set aside a consent and stipulation made by petitioner in open Court agreeing to the entry of two judgments against him amounting to some $13,000. The claim was made by the petitioner that the consent and stipulations were not voluntary but were induced by the atmosphere created by the Court by way of observations or remarks concerning some side issues not related to the merits of the claim upon which such judgments were sought (46-47).* The remarks in question dealt with a suggestion by the Court that "criminal acts had been committed" either by the petitioner or his son-in-law in connection with the verification of the answer and bill of particulars as well as signatures on certain cards when the brokerage account was opened by the petitioner with the respondent (48). These observations injected such overpowering fear in petitioner of criminal prosecutions against himself or his son-in-law that the petitioner lost all sense of control and particularly when petitioner was suffering from a physical

* References are to folios of the Trial Record.

disability, as testified to by a physician in open court (48-49).

These observations induced the petitioner's attorney to request the Court that he be permitted to withdraw from the case, the attorney having lost any interest or desire to continue as such and that he could not with propriety continue to represent petitioner in the case (50).

The affidavit of the petitioner which appears in folios 46-63 of the record gives a complete picture of the Court's conduct at the trial and shows the constant threat of criminal action against the petitioner and seriously prejudiced the rights of petitioner by an insinuation that he committed a crime, even to the extent of questioning the propriety of petitioner's attorney who was present at the trial and who then applied to withdraw from the case but the trial court denied his application and shortly thereafter said attorney actually did withdraw from the case. Further details of such action by the Court appear in folios 91-110 of the record.

The Court then, on May 22, 1961, vacated the consent to judgment and to the withdrawal of the answer, but on condition that the trial be set peremptorily for May 26, 1961 (4 days after the decision) as a "continued trial" before the same judge (433).

On the date in question, May 26, 1961, the petitioner appeared in Court with another attorney and requested the Court that "the case be remanded and adjourned" (490). The new attorney submitted two affidavits (485) stating that his appearance at the Court was limited to the extent that the consent judgment be set aside (504). The new attorney particularly insisted that if he were to act in full armor as an attorney he would have to have adequate preparation. He said: "It means that the man wants a trial and he's got to get a lawyer. I can't try a case in three days, a case that's been pending for a year. I wouldn't do it for Kingdom come, for anybody" (506).

The new attorney stated (516):

"I can't go into a case, Judge, at short notice. I'm sorry, Judge.

The Court: Well, it's just too bad.

Mr. Slater: It just certainly is too bad." (516)

* * *

"Mr. Slater: Judge, I want it understood that I'm not participating in any trial. Judge, I'm sorry." (520)

* * *

"The Court: You refuse to go forward?

Mr. Slater: I can't. I'm not ready." (521)

Argument Relied on for Allowance of Writ

(1)

The instant application presents for review the question whether the denial of a proper adjournment of the trial to prepare an adequate defense is a denial of "due process."

There is no such thing as a trial where a defendant is not given as much of a scope as the plaintiff would have in a similar action. Examination of the record as a whole clearly indicates extreme haste in seeking to obtain a judgment, lack of any opportunity to prepare an adequate defense and no opportunity whatever to offer any proof of the defendant's counterclaim. At this point the Court will observe that after an attorney has withdrawn from a case, and a new attorney applies to vacate a consent judgment and the court grants the application on condition that the trial "continue" before that court four days after granting such application and thus forcing new counsel to try a case on so inadequate preparation, clearly is a denial of due process. In the instant case it is also necessary to observe that all the papers relating to the case were retained by the withdrawing counsel and while they might have been made

available to the new counsel, nevertheless three days would have been wholly inadequate to make a study of same.

Evidently, in allowing a trial the Court recognized that the petitioner was entitled to a trial; nevertheless the conditions imposed were of such nature as to virtually deny a trial.

In the Brief submitted to the Court of Appeals reference was made to a number of decisions by the Court of the State of New York holding that where an attorney had withdrawn from the case it is the duty of the Court to continue the case a sufficient length of time to permit defendant to employ other counsel and to enable new counsel to investigate the case and defense.

(2)

The Court of Appeals of the State of New York was in error when it held that it had no jurisdiction to review the "Orders" appearing in the exhibits upon the ground that the Orders sought to be appealed from did not finally determine the action within the meaning of the Constitution of the State of New York. In this connection we must emphasize that the so-called Order of June 6, 1961 was definitely a Judgment and contained the statutory provision "that the plaintiff have execution thereof." It is also important to observe that while the Court of Appeals in its opinion listed two of the Orders as not appealable it did not specifically refer to the Order of June 6.

It is also obvious that no further recourse was left to the defendant after Judgment of June 6, 1961 and there could be no further appeal therefrom if the Court of Appeals should fail to grant it. By denying an appeal to it, it necessarily put a "finis" to this matter and there is no alternative left to the petitioner to enable him to try the issues in this case. This makes it absolutely mandatory for the Court of Appeals both in accordance with the Constitution of the State of New York as well as the Federal Constitution to take jurisdiction in this case, otherwise the defendant would clearly not be given due process as defined in our Constitution.

(3)

The fact that in similar cases, notably *Revona Realty Corp.* v. *Wasserman*, 5 N. Y. (2) 931, or *Murphy* v. *Kaplan*, 11 N. Y. (2) 1111, the New York Court of Appeals refused to entertain appeals claiming that the orders in question were intermediate and not final can have no application here. There might have been, in these cases, other remedies which could have been invoked and thus given the parties "due process." In the case before this Court the defendant has no other remedy. In this connection we quote from a recent decision of this Court:

> "Although fictions are sometimes invented in order to realize judicial conceptions of justice, the Courts are without power to define the constitutional guaranty of due process in terms of a fiction unrelated to reality, without exercising a power to remake constitutional provisions which the constitution has not given them." (*Curry* v. *McCanless*, 307 U. S. 357.)

(4)

The due process clause of the Fourteenth Amendment is not susceptible of reduction to a mathematical formula. (*Gibbs* v. *Burke*, 337 U. S. 773.)

In a recent decision of this Court (*Wolf* v. *Colorado*, 338 U. S. 25) the Court states:

> "Due process of law conveys neither formal nor narrow requirements; the real clue to the problem confronting the judiciary in the application of the due process clause is not to ask where the line is, once for all, to be drawn but to recognize that it is for the Court to draw it by the gradual and empiric process of inclusion and exclusion."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ERNEST KLEIN,
Petitioner.

MAXIMILIAN BADER,
Counsel.

December 15, 1962.

APPENDIX

STATE OF NEW YORK

IN THE COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twenty-seventh day of September, A. D., 1962.

Present. HON. CHARLES S. DESMOND, *Chief Judge, presiding.*

Mo. No. 618

WALSTON & CO., INC.,

Respondent,

vs.

ERNEST KLEIN,

Appellant.

(Action No. 1)

WALSTON & CO., INC.,

Plaintiff-Respondent,

vs.

HIRSCH L. SPIRA,

Defendant.

and

ERNEST KLEIN,

Appellant.

(Action No. 2)

A motion for leave to appeal to the Court of Appeals in the above causes having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion, insofar as it seeks leave to appeal from the orders of the Appellate Division affirming the orders of May 22, 1961 and June 23, 1961, be and the same hereby is dismissed upon the ground that the orders sought to be appealed from do not finally determine the actions within the meaning of the Constitution, and it is

FURTHER ORDERED, that the said motion for leave to appeal be and the same hereby is, in all other respects, denied.

A copy

GEARON KIMBALL,
Deputy Clerk.

SUPREME COURT, U.S.

No. 701

Office-Supreme Court, U.S.
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JOHN F. DAVIS, CLERK

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Petitioner,

v.

WALSTON & CO., INC.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS IN THE STATE OF NEW YORK.

BRIEF FOR WALSTON & CO., INC. IN OPPOSITION.

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v.

WALSTON & CO., INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR WALSTON & CO., INC. IN OPPOSITION.

Jurisdiction.

The order of the Court of Appeals of the State of New York which is sought to be reviewed herein was made on September 27, 1962. The petition for a writ of certiorari was filed on December 28, 1962, ninety-two (92) days thereafter. The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3) and 28 U. S. C. 2101(c), erroneously cited by petitioner as 2102(c).

Questions Presented.

I. **Whether this Court has jurisdiction to review an order made by the Court of Appeals of the State of New York in a civil action, more than ninety days before the petition for certiorari was filed?**

II. **Whether or not the Court of Appeals of the State of New York correctly interpreted its powers and whether an erroneous interpretation of its powers would constitute a violation of the due process clause of the Fourteenth Amendment?**

III. **Whether the Trial Court gave petitioner adequate opportunity to present his defense?**

Statement.

Petitioner, who had victimized thirteen different brokerage houses (R. 171)* was sued by Walston & Co. in two actions for a loss of approximately $13,000.00 (R. 761-762), which it sustained as a result of petitioner's failure to pay for stock which he ordered in his name and in the name of another (R. 770).

In the midst of trial, on April 4, 1961, petitioner voluntarily withdrew his answers and consented to entry of judgment in both actions. His consent was voluntary and came after an 11 day adjournment during which he had ample opportunity to consider his decision (R. 369). Throughout these proceedings, he was represented by

---

* References are to folios in the Printed Papers on Appeal.

competent counsel who withdrew only after petitioner voluntarily consented to the entry of judgment.

On May 22, almost two months later, and more than a month after petitioner had retained new counsel, Messrs. Slater & Wolf, Esqs., Judge Geller granted petitioner's motion to vacate his consent. On May 26, 1961, the day set for the continuance of the trial, petitioner, through his attorney, Mr. Abraham Slater, refused to proceed (R. 492). The Court offered Mr. Slater another week's adjournment (R. 522, 529), but he declined, claiming he needed an additional month to hire new counsel. Counsel already in the case continued, and petitioner was given another opportunity to defend on June 1, 1961, when he defaulted (R. 550, 551). An inquest was held on June 1, 1961, and orders were entered on June 6, 1961, modifying the amounts of the consent judgments entered on April 7, 1961. The petitioner's motion to vacate the June 6th orders was denied on June 23, 1961.

On April 26, 1962 the Appellate Division of the Supreme Court unanimously affirmed the orders entered May 22, 1961, June 6, 1961, and June 23, 1961. Motions for reargument were denied on May 29, 1962, as were motions for leave to appeal to the Court of Appeals. The Court of Appeals itself denied leave to appeal on September 27, 1962.

Argument.

I.

This Court does not have jurisdiction to entertain the Petition because more than ninety days expired between the entry of the order sought to be reviewed, and the filing of the Petition. *Rust Land and Lumber Co.* v. *Jackson,* 250 U. S. 71 (1919).

II.

The Court of Appeals properly denied petitioner's motion for leave to appeal. The only possible authority for an exercise of jurisdiction is contained in Article 6, Section 7(6)(b) of the Constitution of the State of New York. This Section does not bestow an absolute right to appeal to the Court of Appeals, but gives the Court discretion to hear appeals "when required in the interests of substantial justice."

The order appealed from shows compliance with Section 7(6)(b) for the Court denied leave to appeal from the non-final orders of May 22, 1961, and June 23, 1961 "upon the ground that the orders sought to be appealed from do not finally determine the actions within the meaning of the Constitution, • • •", and thereafter provided, "that the said motion for leave to appeal be and the same hereby is, in all other respects, denied."

Clearly, the last portion of the order of the Court of Appeals refers to that portion of the petitioner's motion for leave to appeal relating to the June 6, 1961 order, and

constitutes a provident exercise of the Court's discretion to refuse to entertain the appeal because an appeal would not be "in the interest of substantial justice."

Even if petitioner were correct in his contention that the decisions of the Courts of the State of New York were wrong, "That does not invest this Court with jurisdiction to review those decisions." *Drawdy Investment Co.* v. *Leonard,* 261 F. 2d 226 (5th Cir. 1958).

III.

Petitioner was given an adequate opportunity to present his defense.

As previously indicated, when ably represented by competent counsel, in the midst of trial, petitioner voluntarily consented to the entry of judgment against him. At this point, the requirements of due process had been met. He had been given a fair opportunity to present his defense. *Anderson National Bank* v. *Luckett,* 321 U. S. 233 (1944); *The Drawdy Investment Company* v. *Leonard, supra.* He voluntarily waived his right to a continued hearing on the merits.

The petitioner's subsequent machinations were all addressed to the discretion of the Court. This discretion was exercised in petitioner's behalf and afforded him additional opportunities to present his case on May 26, 1961 and on June 1, 1961. He not only did not avail himself of these opportunities by defaulting, but specifically rejected the Court's offer to give him another week. Due process requires no more than an opportunity to be heard. *A fortiori* due process has been observed when three opportunities have been provided.

Conclusion.

This Court does not have jurisdiction to entertain the Petition, but even if it did, the decision below turns on purely factual issues and presents no question of general interest warranting review by this Court. The Petition for a Writ of Certiorari should be denied.

Dated: New York, New York
January 23, 1963.

Respectfully submitted,

WILLIAMSON PELZ, JR.,
Counsel.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The brief in opposition to the instant petition makes much of a technical claim that the instant petition was filed late. The petition was timely filed as will now be shown.

Facts

The order of the Court of Appeals sought to be reviewed was entered on September 27th, 1962. Notice of this Order was given to the petitioner considerably more than 10 days later. Shortly after petitioner received such

notice from respondent he ordered a Certified Copy of the Record from the Court of Appeals but this was not delivered to the petitioner's attorney until December 27th, 1962. The instant petition for a writ of certiorari was served by mail upon the attorneys for the respondent on December 21st, 1962 and received in the office of the Clerk of the Supreme Court on December 26th, 1962. (Actually the petition was in the office of the Clerk on December 24th, 1962 but this day, being an "unofficial" holiday in the District of Columbia the Clerk did not act on the petition until December 26th, 1962.) The Certified Copy of the Record of the Court of Appeals was received in the office of the Clerk on December 28th, 1962 which was the date that the Clerk docketed the instant petition.

ARGUMENT

The Petition Was Timely Filed

The time for filing a petition for a writ of certiorari is set forth in 28 U. S. C. 2101 (c) which reads as follows:

> "* * * Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit, or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A Justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days. * * * *"

Rule 23(3) of the Supreme Court Rules (which cannot conflict with the Statute), reads in part as follows:

> "* * * A petition for a writ of certiorari in all other cases shall be deemed in time when it and the certified record required by Rule 21 are filed with the Clerk within the time prescribed by law. * * * "

It is conceded that, if the time from which the petitioner obtained *notice* of the New York Court of Appeals' Order is used to compute the ninety day period then there is no question as to the timeliness of the instant petition since notice was not given the petitioner of said Order until a considerable time *subsequent* to the entry of the Order (as appears from the *Notice of Entry* attached to the Order). Since petitioner's time under the New York Rules would not commence to run until after *Notice of Entry* of the Order was given (and obviously petitioner could not be required to take any action until he knew about the entry of the Order), 28 U. S. C. 2101, should be interpreted to read "* * * ninety days after *notice of* entry of such judgment or *decree* is received by the petitioner. * * * " (words italicized supplied). Any other interpretation would, of course, be a violation of due process of law.

However the petition is timely even if the effective date of entry of the Order was September 27th, 1962. The Rules provide that the day of entry must be excluded (see, *Smith* v. *Gale*, 137 U. S. 577). Thus the date to be used would be September 28th, 1962. Ninety days from that date is December 26th, 1962 and, on that date the instant petition for a writ of certiorari was *filed* in this Court. The Clerk refused to docket this petition on that date because the Certified Copy of the record of the Court of Appeals had not yet been received. However, it has been held by this Court, in a case directly in point, that if a petitioner takes any step within the time allowed to per-

fect his appeal the time stops running at that point. In *U. S.* v. *Adams*, 6 Wall. 101, 18 L. Ed. 792 (793), an appellant filed his Notice of Appeal in time but failed to take the further steps as required by the Rules of this Court. In considering the timeliness of the appeal the Court ruled as follows:

> "* * * We consider the paper filed by the solicitor in the office of the Clerk of the Court as sufficient in form to indicate the intention to exercise this right. * * *"

Finally the petitioner points out that, under the peculiar circumstances of the December 24th "unofficial holiday" in the District of Columbia, two additional days should be granted to petitioner to file his papers. December 24th was not held to be a legal holiday in Washington but this Court was closed under the Executive Order of the President of the United States. The next available day for business was December 26th, 1962 and therefore the December 24th, 1962 and December 25th, 1962 period should be excluded from any period of limitation. Indeed had the Court been open on December 24th, 1962 petitioner could have filed an application for an extension of time which would have been received by the Court on December 26th, 1962 and thus would have extended his time. The failure of the Court to be open on December 24th, 1962 thus severely prejudiced petitioner (a resident of the State of New York) and therefore the two-day period should not be held against him.

Respectfully submitted,

MAXIMILIAN BAIER,
Counsel for Petitioner,
50 Church Street,
New York, N. Y.

SUPREME COURT, U. S.

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50 Church Street,
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REPLY BRIEF

I

THE FILING OF PETITION WAS TIMELY.

Evidently mistaking the date of docketing the record for the date of the filing of the petition for the writ of certiorari, respondent herein states that the petition for the writ was filed on December 28, 1962, 92 days after the entry of the order of the Court of Appeals of the State of New York. Such is not the fact.

It is respectfully submitted that the petition was transmitted to the Clerk of this Court by letter (first-class postage fully prepaid) dated and mailed on December 21, 1962, accompanied by a check in the sum of $100.00, which was as follows:

"December 21, 1962

Clerk
U. S. Supreme Court
Washington, D. C.

Re: Klein vs. Walston & Co.

Dear Sir:

I transmit herewith Petition for Writ of Certiorari in the above matter together with check in the sum of One Hundred ($100.00) Dollars as filing fee.

I will transmit under separate cover the record in this case as soon as I receive a certified copy of same from the New York Court of Appeals.

Respectfully yours,

BADER AND BADER

MB:BS"

The date of receipt of petition was December 26, 1962, evidently because the dates from December 22nd to and including the 25th, were dates when the Clerk's office was not open to receive mail.

The certified record itself was mailed to the Court as soon as it was received from the New York Court of Appeals and was received by the Clerk of this Court on December 28th, 1962, and was docketed on that date.

A copy of the telegram received from the Clerk of this Court in reply to petitioner's request, is as follows:

"WESTERN UNION
TELEGRAM

1963 JAN 25 AM 11 20

NHA012 PC112
W NFA024 COLLECT NF WASHINGTON DC 25 1054A EST
MAXIMILIAN BADER, ESQUIRE
50 CHURCH ST NYK

PETITION FOR CERTIORARI KLEIN CASE RECEIVED DECEMBER 26TH. RECORD NOT RECEIVED UNTIL DECEMBER 28TH AND CASE DOCKETED THAT DATE

JOHN F. DAVIS CLERK (OO)."

As early as in the case of *U. S.* v. *Adams* (6 Wall 101), it was held by this Court that the paper filed in the office of the Clerk of the Court was sufficient to indicate the intent to exercise the right to apply to this Court for a review of the matter.

The date of entry of the order of the Court of Appeals (September 27, 1962), must be excluded from the computation (*Smith* v. *Gale*, 137 U. S. 577).

The rule itself (Rule 23) considers the filing of a petition timely if filed with the Clerk within the time prescribed by law. The filing of the petition was in advance of the time prescribed and the record was filed promptly upon its receipt from Albany.

The order of the Court of Appeals was put on pages 11-12 as the Appendix of the Petition.

Assuming, arguendo, that the last day to file the certified record was December 27, the two holidays, December 24 and December 25, would have extended the last filing day to December 29th. Respondent's claim of late filing is therefore contrary to the facts and without merit.

II

As to the "Statement" in Respondent's Brief on page 2 that "Petitioner had victimized thirteen different brokerage houses" it is respectfully submitted that this is the malicious and wholly false statement of respondent's trial counsel in the Court below, uncorroborated and not substantiated by any shred of evidence.

It must be obvious that the employment of these untruths in the very first line of respondent's "Statement" is calculated to place petitioner in an unfavorable light in the eyes of this Court and besmirching his good character and reputation.

As to the other statements and folio references in respondent's brief we do not wish to point out their individual incorrectnesses but submit the entire record for determination of the true facts in the matter.

III

As to respondents interpretation of the decision of the Court of Appeals that its dismissal was based on the Court's discretion it is respectfully submitted that it is evident from the order of the Court of Appeals that it was based solely on the alleged limitation of its powers under the New York State Constitution which the petitioner maintains deprived him of due process.

The order of June 6th, 1961, was not referred to, in the decision or order of the Court of Appeals. Any ruling with respect to such order, had it been made, would have been expressly noted and discussed by the Court of Appeals in the same manner, as the Court of Appeals did, with regard to the orders of May 22 and June 23, 1961. The June 6th order was entirely overlooked, not passed on, by the Court

of Appeals, and yet, is clearly a final orde
make any determination thereon deprived
process.

It is respectfully submitted that the
orders of May 22, 1961, June 23, 1961, and
not final orders, is clearly erroneous.

In holding that the orders sought to
do not finally determine the actions withi
the New York Constitution, the Court of
that it has no power to entertain such
decision deprived petitioner of due process

It is respectfully submitted that the fai
of Appeals to exercise *its power to review*
resulted in depriving petitioner of his pr
of due process.

Respectfully submitted,

M

Dated: New York, N. Y.
January 31, 1963.